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February 24, 2021

Via Electronic Filing (http://www.regulations.gov)

Acting Secretary Milton A. Stewart
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Amy DeBisschop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

Re: Notice of Proposed Rulemaking (RIN: 1235-AA34), *Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date*

Dear Secretary Stewart and Ms. DeBisschop:

The undersigned Attorneys General of New York, Pennsylvania, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington write in support of the proposed rulemaking by the U.S. Department of Labor ("DOL" or "Department") to delay the effective date of the Independent Contractor Rule. *See Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date*, 86 Fed. Reg. 8326 (Feb. 5, 2021). We thank the agency for this opportunity to comment and respectfully request that DOL withdraw the Rule in its entirety.

The Independent Contractor Rule was rushed to completion with a truncated comment period and finalized in just over three months. DOL announced the notice of proposed rulemaking on September 22, 2020, and only provided 30 days to comment. *See Independent Contractor Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 60,600 (Sept. 25, 2020) ("Proposed Rule"). The undersigned Attorneys General, among others, urged the Department to provide at least 60 days for public comment, noting that the Proposed Rule raises extremely

important legal and policy matters.[1] However, DOL denied the request despite the rule's significance, simply asserting that 30 days was a "sufficient period of time to comment."[2] The undersigned then submitted a comment explaining our strong opposition to the rule, noting that the agency failed to consider the alternative of not regulating.[3] We incorporate our prior arguments by reference here and focus on the questions raised by the Department's February 5 proposal. *See* 86 Fed. Reg. at 8327.

I. The Independent Contractor Rule Fails to Effectuate the FLSA's Purpose.

The Independent Contractor Rule fails to effectuate the FLSA's purpose because it codifies a standard that unreasonably excludes relevant criteria from the determination of whether a worker is covered by that statute. In doing so, the Rule ignores the primary aim of the FLSA: To "protect all covered workers from substandard wages and oppressive working hours . . . ." *New York v. Scalia*, 464 F. Supp. 3d 528, 533 (S.D.N.Y. 2020) ("*Scalia I*") (quoting *Mei Xing Yu v. Hasaki Rest., Inc.*, 944 F.3d 395, 402 (2d Cir. 2019)). As the undersigned Attorneys General explained in our comment on the Proposed Rule, the FLSA's coverage is intentionally expansive to "prevent the circumvention of the act or any of its provisions through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device."[4] Rather than codify a standard that defines employment consistent with the FLSA's broad reach—a standard that holistically considers the economic reality of any employment relationship and that prevents evasion of the FLSA's protections—the Independent Contractor Rule implements a narrowed test that prioritizes particular factors that favor independent contractor status, denying workers coverage under the act. Because the Rule fails to effectuate the FLSA's purpose, the Department should delay the effective date and withdraw the rule.

The FLSA was enacted "in the midst of the Great Depression [] to combat the pervasive 'evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.'" *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 132 (4th Cir. 2017) (quoting S. Rep. No. 75-884, at 4 (1937)). The FLSA's protections apply only in the context of employment relationships; therefore, independent contractors are not covered. Although the statute does not define "independent contractor," it defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), "employee" as "any individual employed by an employer," *id.* at 203(e), and

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[1] *See* State AGs Request to Extend Comment Period (Sept. 29, 2020), https://www.regulations.gov/document?D=WHD-2020-0007-0015.
[2] *See* WHD-2020-0007 response to comment period extension requests (Oct. 21, 2020), https://www.regulations.gov/document?D=WHD-2020-0007-0193.
[3] *See* State AGs Comment re: Independent Contractor NPRM (Oct. 26, 2020), https://www.regulations.gov/document?D=WHD-2020-0007-1711.
[4] *Joint Hearings before the S. Committee on Education and Labor and the H. Committee on Labor on S. 2475 and H.R. 7200 Bills to Provide for the Establishment of Fair Labor Standards in Employments in and Affecting Interstate Commerce and for Other Purposes* ("*Joint Hearings*"), Part 1 at 77 (June 2-5, 1937) (testimony of Robert H. Jackson, Dep't of Justice) (describing "home work" and section 6(a) of the bill).

"employ" "includes to suffer or permit to work," *id.* at 203(g)—thereby covering a wide range of employment arrangements. In fact, the term "employee" was "given the broadest definition that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo Black)).

To give effect to the FLSA's intentionally broad definition of employment, courts determine if an employment relationship exists through a holistic evaluation of the economic realities of that relationship. Yet, the Independent Contractor Rule, which states that if the "nature and degree of the individual's control over the work" and the "opportunity for profit or loss . . . both point towards the same classification" then there is a "substantial likelihood that is the individual's accurate classification," unduly narrows the inquiry. 86 Fed. Reg. at 1246 (to be codified at 29 C.F.R. § 795.105(c)). In addition, relegating and narrowing the "other factors"—the "amount of skill required for the work," the "degree of permanence" of the relationship, and "whether the work is part of an integrated unit of production"—departs from the text and purpose of the FLSA as the Supreme Court and the Circuit Courts have interpreted it since its enactment.[5] The new test ignores the breadth of the "suffer or permit to work" definition, which was "plainly designed to comprehend all the classes of relationship which previously had been designated specifically as likely means of avoidance of the Act," including inappropriate use of the "independent contractor" label.[6]

The Independent Contractor Rule's reliance on *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), as reason to implement a standard that ignores the FLSA's broad remedial design is misplaced. There, the Court explained that the exceptions to the FLSA should be read "fairly" instead of "narrowly," given the lack of "textual indication" otherwise. *See id.* at 1141 (citations omitted). But a "fair reading" of the FLSA's definitions requires a broad interpretation given the "textual indication" of the self-referential, sweeping language. The Independent Contractor Rule's radical assertion that "respecting the independence of workers whom the FLSA does not cover is as much a part of the Act's purpose as extending the Act's coverage to workers who need its protection" sounds in *Lochner* rather than *Encino* and ignores the purposes of the Act. 86 Fed. Reg. at 1207–08; *see Lochner v. New York*, 198 U.S. 45 (1905), *abrogated as recognized by Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 861 (1992). Issued during the economic downturn caused by the global pandemic, the Independent Contractor Rule's interpretation is a vast departure from the purposes of the statute enacted to protect workers in the midst of the Great Depression.

II. DOL Failed to Adequately Consider the Costs and Benefits of the Independent Contractor Rule.

The Administrative Procedure Act (APA) requires that federal agencies "engage in reasoned decisionmaking," considering "the advantages *and* the disadvantages of agency

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[5] *See* State AGs Comment re: Independent Contractor NPRM, *supra* note 3 at 15–19.
[6] Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 U.C.L.A. L. Rev. 983, 1100–01 (1999) (quoting Brief of the Administrator at 27–29, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (No. 562)).

decisions" before taking action. *Michigan v. E.P.A.*, 576 U.S. 743, 753 (2015). As the Supreme Court has held, an agency may not "entirely fail to consider an important aspect of the problem" when deciding whether a regulation is appropriate. *Id.* at 752 (quoting *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983) (brackets and quotation marks omitted)).

Here, DOL failed to grapple with the significant harms that flow from the Independent Contractor Rule, including (1) harms to workers in the States' jurisdictions; (2) reduced tax revenue and other economic impacts; and (3) increased administrative and enforcement costs. DOL's failure to consider these "disadvantages" violates the APA, warranting delay and ultimately, withdrawal of the Rule. *See, e.g.*, *Michigan v. EPA*, 576 U.S. at 759-760.

A. The Independent Contractor Rule Fails to Adequately Consider the Harm to Workers.

The Independent Contractor Rule leaves the States' workers more vulnerable to exploitation by incentivizing employers to misclassify them as independent contractors. Once misclassified, these workers will not be entitled to basic labor protections such as timely payment of wages, timekeeping records, pay stubs, and reimbursement for expenditures that primarily benefit the employer.[7] Nor can many of these workers receive health insurance, paid leave, workers' compensation for workplace injuries, overtime, or unemployment insurance.[8] Misclassified workers also suffer suppressed wages and experience wage theft at astonishing rates.[9] These harms will inflict the most damage on people of color and immigrants, who face higher rates of unemployment.[10] These workers also are disproportionately represented in low-paying jobs where independent contractor misclassification is common, such as delivery services, janitorial services, agriculture, transportation, and home care and housekeeping, as well

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[7] *See* NELP, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (October 2020), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf.

[8] *See id*; Françoise Carré, (In)dependent Contractor Misclassification, Economic Policy Institute, Briefing Paper No. 403 (June 8, 2015), https://files.epi.org/pdf/87595.pdf.

[9] *See* Catherine Ruckelshaus et al., Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work, NELP, 9–27 (2014), https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.

[10] *See* Center on Budget and Policy Priorities, Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships (updated Feb. 18, 2021), https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and.

as in app-dispatched work.[11] The Independent Contractor Rule will therefore exacerbate racial disparities in worker protections.[12]

DOL gave incredibly short shrift to this increased misclassification and argued—without any supporting evidence—that the Independent Contractor Rule "is likely to reduce both inadvertent and intentional FLSA misclassification." 86 Fed. Reg. at 1207. Similarly, DOL failed to address how the ongoing COVID-19 pandemic and record high rates of unemployment[13] may lead to increased vulnerability for misclassified workers, who have even less bargaining power than usual to demand fair conditions.[14] Perversely, the very workers who stand to suffer the worst harms due to the Independent Contractor Rule are most needed to provide essential services in the pandemic.[15]

B. The Independent Contractor Rule Fails to Adequately Consider the Harm to the States.

The States have significant experience enforcing laws that protect workers' economic security, health, and welfare. As part of these enforcement efforts, the States investigate and prosecute violators of minimum wage, overtime, and anti-discrimination laws. The Independent Contractor Rule will frustrate these efforts by encouraging a race to the bottom for employers to misclassify workers as independent contractors in order to limit monetary and legal liabilities. The Independent Contractor Rule will also impose added administrative and enforcement costs on the States, as more misclassified workers will file complaints relating to wage and hour violations and the failure to provide worker protections, which will in turn cause the States to expend more resources to investigate and remedy these complaints. Finally, increased worker misclassification will depress the States' economic reserves, as they lose revenue from payroll taxes and a loss of funds to unemployment insurance, workers' compensation, and paid leave programs.[16]

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[11] *See* NELP, *supra* note 7 at 2.
[12] *See id.* at 1 ("[M]isclassification is an issue of racial justice. Many poor workers of color and immigrant workers are stuck in a separate and unequal economy where they are underpaid, put in harm's way on the job, and left to fend for themselves.").
[13] *See* Center on Budget and Policy Priorities, *supra* note 10.
[14] *See* Janice Fine et al., Maintaining effective U.S. labor standards enforcement through the coronavirus, Washington Center for Equitable Growth, 2 (Sept. 3, 2020), https://equitablegrowth.org/wp-content/uploads/2020/09/090320-labor-enforcement-report.pdf.
[15] *See* Center on Budget and Policy Priorities, *supra* note 10; *see also* State AGs Comment re: Independent Contractor NPRM, *supra* note 3 at 11–12.
[16] *See, e.g.*, Karl A. Racine, Issue Brief and Economic Report, Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry, 13 (Sept. 2019), https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf. (Attorney General report noting that misclassification results in Social Security and Medicaid losing significant resources, state-run unemployment insurance programs going underfunded, and workers' compensation premiums going unpaid); *see also* State AGs Comment re: Independent Contractor NPRM, *supra* note 3.

DOL acknowledged the Independent Contractor Rule may involve a cost transfer for "employer provided benefits, tax liability, earnings, minimum wage and overtime pay, accurate classification of workers, and conversions of employee jobs to independent contractor jobs." 86 Fed. Reg. at 1214. However, the Department failed to quantify the magnitude of this cost transfer or explain how the Independent Contractor Rule's benefits outweigh these costs. *See id.* Particularly now, when unemployment and permanent job losses remain high and those that are working are increasingly concerned with adequate paid sick leave protections,[17] DOL's decision to ignore these costs simply does not pass muster under the APA. *See, e.g., State Farm,* 463 U.S. at 43.

III. The Independent Contractor Rule Does Not Provide Clarity.

DOL attempts to justify the Independent Contractor Rule as a means "to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy." 86 Fed. Reg. at 1168. Far from bolstering "certainty," however, the Independent Contractor Rule introduces unprecedented uncertainty into independent contractor law. As such, the undersigned support delaying and withdrawing the Rule.

As the Independent Contractor Rule itself admits, "[c]ourts and the Department have long interpreted the 'suffer or permit' standard to require an evaluation of the extent of the worker's economic dependence on the potential employer . . . ." *Id.* "The ultimate inquiry is whether, as a matter of economic reality, the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor)." *Id.*

For nearly 80 years, the Supreme Court and the circuit courts have honed multi-factor "economic reality" tests that are "based on a totality of the circumstances." *Brock v. Superior Care, Inc*., 840 F.2d 1054, 1059 (2d Cir. 1988) (citations omitted). Throughout this history, it has been well settled that "determination of the relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). To that end, "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for" determining the nature of the economic relationship. *United States v. Silk*, 331 U.S. 704, 716 (1947) (discussing economic reality in the context of the National Labor Relations Act and Social Security Act). But consistent with FLSA's remedial purposes, "[n]o one [factor] is controlling nor is the list complete." *Id*.; *see also Rutherford*, 331 U.S. at 729 (applying *Silk* factors in FLSA context and adding an additional factor).

The Independent Contractor Rule upends this settled law by purporting to "sharpen" the independent contractor inquiry into five factors, with special emphasis on only two factors—the opposite of the holistic approach long since established by the Supreme Court. 86 Fed. Reg. at 1168, 1172. As the Department cannot actually overrule the Court or undo its precedents, *see* 29 C.F.R. § 785.2 ("The ultimate decisions on interpretations of the [FLSA] are made by the

[17] Janice Fine, *supra* note 14 at 2 (discussing survey of Californians).

courts."), regulated parties will be caught between longstanding precedent and DOL's new test that has been neither put forth nor endorsed by any court. Contrary to the Department's claims, then, the Rule will produce greater confusion and more litigation as parties attempt to sort out which workers are or are not properly classified as independent contractors.

Litigation will be further complicated by state wage and hour laws. Indeed, the Department observes that "states where the laws may more stringently limit who qualifies as an independent contractor (such as California)" will be unaffected by the Rule, effectively conceding that the Rule will not create certainty for employees, employers, and other stakeholders throughout the country. 86 Fed. Reg. at 1227. The Rule does not attempt to address or resolve this inconsistency with state laws, noting that conflicting state laws "are outside the scope of this rulemaking." *Id*. at 1177.

The Rule also specifically creates confusion for veterans and the agricultural sector, as it directly conflicts with the Department's Uniformed Services Employment and Reemployment Rights Act and Migrant and Seasonal Agricultural Worker Protection Act regulations, which include traditional multi-factor economic reality tests for assessing whether individuals are employees or independent contractors. *See* 29 C.F.R. § 500.20(h) (setting forth a six-factor test that requires "an evaluation of all of the circumstances"); 20 C.F.R. § 1002.44 (setting forth a six-factor test where "[n]o single one of the[] factors is controlling"). In response to comments pointing out this discrepancy, DOL offers no reasoned explanation for failing to harmonize its regulations in a rule whose raison d'être is the harmonization of purportedly differing standards that drive up transaction costs for employers and employees.

With respect to farm laborers, DOL states that it is "unsure whether application of the six factor economic reality test described in [the MSPA] regulation has resulted in confusion and uncertainty in the more limited MSPA context." 86 Fed. Reg. at 1177. And ultimately, it finds that the holistic MSPA standard is "generally consistent" with the Independent Contractor Rule and, therefore, does not need revision—without explaining why the similar tests adopted by the courts *do* need revision. For veterans, the Department simply states—in a footnote—that it is excluding veterans because the Rule has an "incremental focus." *Id.* at 1177 n.17. These discussions do nothing to resolve the confusing conflicts created by the Rule for veterans and farmworkers, thereby directly undermining DOL's stated aim and casting doubt on its projections of the Rule's impact on transaction costs. *See New York v. Scalia*, ___ F. Supp. 3d ____, 2020 WL 5370871, at *32 (S.D.N.Y. Sept. 8, 2020) ("*Scalia II*") (holding joint employer rule was arbitrary and capricious due to conflict between FLSA and MSPA regulations, which could lead to increased costs for employers subject to both standards). Accordingly, the Rule should be delayed and ultimately withdrawn.

IV. Conclusion.

We greatly appreciate the opportunity to comment on the proposed delay and agree with the Department that the delay is "reasonable" and will "not be disruptive." 86 Fed. Reg. at 8327. Moreover, the Independent Contractor Rule raises "substantial questions of fact, law, [and] policy," and ultimately cannot withstand scrutiny. Accordingly, in keeping with the "Regulatory

Freeze Pending Review" memorandum, we encourage the agency to "take further appropriate action," 86 Fed. Reg. at 7424 (Jan. 28, 2021), and withdraw the Rule in its entirety.[18]

Sincerely,

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[18] Because the Independent Contractor Rule is an interpretive rule, it can be withdrawn without notice and comment. The Supreme Court has held that the "exemption of interpretive rules from the notice-and-comment process is *categorical*." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 100 (2015) (emphasis added). To require notice and comment to withdraw an interpretive rule would "improperly impose[] on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA." *Id.* (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)). "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." *Id.* at 101.

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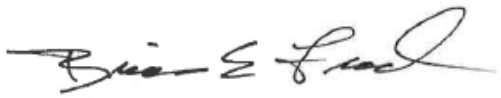

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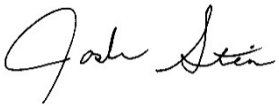

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